SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 73-1522

October Term, 1973

RAYMOND MARQUEZ,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Raymond Marquez, prays that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the Second Circuit, entered in this case on January 22, 1974.

OPINION BELOW

The opinion of the District Court (Weinfeld, J.) is annexed hereto as Exhibit "A". The opinion of the Court of Appeals for the Second Circuit affirming the order of the District Court is annexed hereto as Exhibit "B". The order of the Court of Appeals for the Second Circuit denying petitioner's application for rehearing is annexed hereto as Exhibit "C".

JURISDICTION

The order of the Court of Appeals was entered on January 22, 1974. On February 4, 1974, petitioner filed a petition for rehearing which was denied by the Court of Appeals on March 12, 1974. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the admitted perjury of two of the government's witnesses at petitioner's trial requires that he be granted a new trial, and what is the appropriate standard of review to be used in deciding petitioner's motion for a new trial.

2. Whether petitioner acted with due diligence in obtaining the evidence of perjury.

STATUTE AND RULE INVOLVED

Federal Rules of Criminal Procedure, Rule 33:

> The Court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within five days after verdict or finding of guilty or within such further time as the court may fix during the five day period.

STATEMENT OF THE CASE

The Record

The record of the Court of Appeals consists of all filed documents as well as the minutes of the hearing on petitioner's motion for a new trial.

The Facts

On December 10, 1970, petitioner, along with two co-defendants, was convicted, after a jury trial, of three counts of an indictment charging them with causing one Juan Nieves Monserrate to travel between New York City and Puerto Rico for the purpose of (1) distributing the proceeds of an illegal gambling operation; (2) committing extortion; and (3) conspiring to commig both these offenses. (18 U.S.C. Section 1952, 371).

This conviction was affirmed by the Court of Appeals (*United States v. Marquez*, 449 F.2d 89 (2d Cir. 1971) and a petition for a writ of certiorari was denied by the Supreme Court (*Marquez v. United States*, 405 U.S. 963 (1972).

Petitioner moved for a new trial on the grounds that two witnesses for the government had perjured themselves at petitioner's trial.

On April 30, 1973, a hearing was held on this motion (Weinfeld, J.).

On August 3, 1973, the motion was denied.

The denial of the motion was affirmed by the Court of Appeals and on March 12, 1974, the same court denied petitioner's application for rehearing.

The Trial

The government's charge was that petitioner, Marquez, was the head of a gambling operation. That Monserrate, an employee of that operation, was accused by Marquez of cheating the operation. Monserrate and his father-in-law, Thomas Alvarez, testified that Marquez accused Monserrate of cheating the operation and that $14,000 was owing to Marquez. Monserrate denied cheating Marquez, but Marquez, among others, threatened him and ordered him to go to Puerto Rico and get approximately $7,500 to settle this debt. Monserrate then flew to Puerto Rico and took $7,435 out of the bank and flew to Kennedy Airport. At Kennedy he was arrested by Federal agents and decided to cooperate. This cooperation led to the arrest of Marquez for the charges of which he was later convicted.

After the affirmance of Marquez's conviction, newly retained counsel, with the assistance of Pedro Lopez, obtained tapes of Monserrate and Alvarez which contained statements at variance with their trial testimony. At the hearing on the motion for a new trial, Monserrate and Alvarez admitted that their trial testimony that they were not cheating Marquez was false. Monserrate explained the reason for this perjury as being fear of reprisal by Marquez.

As to other portions of the taped interview of Monserrate and Alvarez which were at odds with their testimony at trial, the District Court found that the trial testimony was true.

REASONS FOR GRANTING THE WRIT

The issues raised in this case are of substantial importance to the effective administration of criminal justice, specifically relating to Rule 33 of the Federal Rules of Criminal Procedure. Petitioner moved under Rule 33 for a new trial on the grounds of the use of admitted perjury at his trial. This raises serious questions about the nature of such a motion where the newly discovered evidence shows the use at trial of admitted perjury.

There is considerable confusion between and within the circuits as to the standard to be employed in reviewing such motions.

1. Rule 33 of the Federal Rules of Criminal Procedure does not by its own terms differentiate between motions generally made on the basis of newly discovered evidence and those where the newly discovered evidence is to the effect that perjury was relied upon during trial.

The cases in the Circuit Court of Appeals have made this distinction. The rule, however, is not the same in each Circuit.

In *United States v. Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969) the appropriate standard was stated as:

> Where the conviction is shown to be based even in part upon perjured testimony, however, a court will not stop to inquire as to the precise effect of perjury, but will order a new trial if without the perjury the jury might not have convicted. *Mesarosh v. United States*, 352 U.S. 1 (1956); *Larrison v. United States*, 24 F. 2d 82 (7th Cir. 1928). 416 F.2d at 577

This standard is commonly called the *Larrison* test. See, *United States v. Miller*, 411 F.2d 825, 830 (2d Cir. 1969), and the cases cited therein.

In *United States v. DeSapio*, 435 F.2d 272 (2d Cir. 1970) cert. denied 402 U.S. 999 (1971), the Court of Appeals for the Second Circuit implied that the *Larrison* test should apply only to cases of prosecutorial misconduct.

> We are inclined to agree that the less severe *Larrison* test should be confined to cases of prosecutorial misconduct. 435 F.2d at 286 ftnt. 14.

Thus *DeSapio* leaves the clear implication that the *Berry v.*

State, 10 Ga. 511, 527 (1851) test will apply to a motion for a new trial based on the allegation of the use of perjured testimony at trial unless the government was a party to the perjury. See *United States ex rel. Rice v. Vincent*, ——F.2d——, (2d Cir. Slip op. 1655, 1666 2/7/74).

This leaves a Rule 33 motion predicated on the admitted use of perjury at trial, albeit without the knowledge of the prosecutor, in exactly the same position as one simply based on newly discovered evidence.

This is not proper. There is a real and fundamental distinction between these two situations. The effect of the use of perjury to convict is a far greater threat to "the untainted administration of Justice . . . " *Mesarosh v. United States*, supra at 14. Moreover, a conviction based on perjury is inherently more offensive than a conviction which resulted from the absence of some helpful evidence.

The cases in other Circuits as well as the opinions of noted commentators indicate the wide-spread awareness of the need to distinguish between these two types of Rule 33 motions.

The following cases directly or indirectly, adopt the *Larrison* test in perjury situations: *United States v. Smith*, 433 F.2d 149 (5th Cir. 1970); *Newman v. United States*, 238 F.2d 861, 862 f.1 (5th Cir. 1956); *Harrison v. United States*, 191 F.2d 874 (5th Cir. 1951); *United States v. Gerdon*, 178 F.2d 896 (6th Cir. 1949) cert. den. 339 U.S. 935; *United States v. Johnson*, 142 F.2d 588 (7th Cir. 1944); *United States v. Curran*, 465 F.2d 260 (7th Cir. 1972); *United States v. Briola*, 465 F.2d 1018, (10th Cir. 1972) cert. den. 409 U.S. 1108 reh. den. 410 U.S. 960.

One Circuit has gone as far as to imply that when perjury is the basis for a Rule 33 motion it should not really be thought of as "newly discovered evidence" and that the *Larrison* test should apply. *United States v. Meyers*, 484 F.2d 113, 116 (3d Cir. 1973).

Noted commentators treat the applicability of *Larrison* to perjury situations as axiomatic.

> If a trial court finds that a material witness did commit perjury, and without his testimony the jury might not have convicted, a new trial is necessary. 8A Moore's Federal Practice, Paragraph 33.06(1).

See, 2 Wright, Federal Practice & Procedure, §557.

This Court noted the existence of the *Berry* and *Larrison* tests but has not spoken on the issue of the areas of their respective applicability. *United States v. Johnson*, 327 U.S. 106, 111 f.5 (1946).

It would appear that there is a clear conflict as to the appropriate standard to be used to review Rule 33 motions based upon the use at trial of perjured testimony. This conflict should be resolved by this Court.

It is clear, that in the case, despite disclaimers to the contrary, that the *Berry* test was relied upon by the Courts below.

Here, the perjury of Monserrate and Alvarez is admitted by all parties. Thus, the suspicion attendant to recantation cases is not a factor. E.g. *United States v. Troche*, 213 F.2d 401 (2d Cir. 1954).

Petitioner suggests that the *Larrison* test should be applied and that under that test he should be granted a new trial.

The decision below refers to the double perjury in this case as cumulative and as affecting credibility only. This is erroneous.

Marquez asserts that the use of perjury in this case was material in two separate and distinct ways: First, as it affected the credibility of the witnesses, and second, its effect on the

substance of the defense. It is to the former that the Courts below address themselves.

Marquez, of course, contends that on the issue of credibility alone the effect of the perjury would warrant a new trial. Had the jury known that the witnesses had perjured themselves, they would have been entitled to disregard any part or all of the testimony of those witnesses. This effect must not be taken lightly, since these witnesses were the prosecution's entire case. cf *Giglio v. United States*. 405 U.S. 150 (1972).

It is not, however, the effect of the perjury on the credibility of the witnesses which Marquez stresses. The more significant impact of the perjury is its effect on the substance of the defense. This is virtually ignored in the opinion below.

The Court below in its opinion stated:

> "Whether or not Monserrate or his father-in-law cheated Marquez' policy operation was not an element of the crimes charged against him or directly related to his guilt or innocence. (A-8)* Most importantly, however, the question of cheating was tangential to the principal issues; it went principally to credibility; it did not touch upon the essential elements of the crime". (A-10)

This trial presented a clear choice of which theory to accept, that of the government or that of the defense. The government alleged that Monserrate went to get this money because of threats made by the defendants. The defense contended that Monserrate returned the money voluntarily.

Without the exposure of this perjury the jury was left with a choice which did not reflect the reality of the situation. The jury

* References are to petitioner's appendix and are designated "A".

was led to believe that Monserrate and Alvarez did not cheat Marquez and that Monserrate therefore was taking the money out of his own pocket to give to Marquez. Certainly, this is difficult to believe and the inference of coercion is virtually unavoidable. The truth was that Monserrate and Alvarez had cheated Marquez. Moreover, an amount far less than that which he received was agreed upon to settle the matter. This would have presented a very different picture to the jury.

Monserrate had cheated petitioner and made an advantageous deal to settle the matter. His swiftness in attempting to return the money is explained as easily by this as by possible coercion.

So, this seemingly minor perjury (in the context of credibility alone) really changed the entire perspective in which the jury viewed the case. Glib comments that petitioner's theory approaches incredibility or that it was a sham are not helpful in determining the impact of the perjury on this trial.

Furthermore, Monserrate's explanation for his perjury is absurd. He was willing to testify against Marquez and face supposed reprisal, but was afraid to admit he was a cheat. Of the two acts, it is the former, if either, which would evoke reprisal.

Virtually any perjury can be characterized as going only to credibility. For example: a witness testifies on direct that he saw defendant commit a crime and on cross-examination testifies that he did not see defendant commit the crime and that he lied on direct. It could be said that this affected credibility only in that it placed two versions of the events before the jury which then would decide which it chose to believe. Clearly, there is an effect on both credibility and substance. On the other hand, a witness is asked on cross-examination if he has ever been convicted of a crime and he answers no. This is then shown to be perjurious. In this letter example, the only purpose for the question was to impeach credibility and the perjury would only affect credibility.

The facts of this case are much more akin to the first example than the second. The underlying reason for the line of questions about cheating was not to show a prior bad act to impeach credibility, but rather to establish a basis for the theory of the defense. That it may also have had an impact on credibility is not controlling.

When the effect of the perjury admitted at petitioner's trial is viewed in this light, a new trial is required.

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in federal courts (citations omitted). Therefore, fastidious regard for the honor of the administration of justice requires this Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. (citations omitted) *Mesarosh v. United States*, supra, at 14.

2. The finding below of a lack of due diligence on the part of Marquez is based on an incorrect reading of the hearing minutes. The Courts below relied on a slip of the tongue on the part of Lopez to the effect that he first spoke to Marquez's current counsel in the Spring of 1971. (41B-42B)** See opinion below (A17).

The line of questions preceding this testimony indicates that counsel was following a chronological sequence. The reference to the Spring of 1971 clearly refers to the Spring of 1972. On redirect, this matter was cleared up when Lopez testified that the first time he met with present counsel was the Spring of 1972 (73B).

** References are to the appendix in the Court of Appeals and are designated "B".

CONCLUSION

FOR THE REASONS STATED ABOVE THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE DISTRICT COURT

EDWARD WEINFELD, D.J.

This motion for a new trial is predicated upon the alleged perjury of two government witnesses. The movant, Raymond Marques, along with his two codefendants, was convicted on December 10, 1970, after a six-day trial on all three counts of an indictment charging them with causing Juan Nieves Monserrate to travel between New York City and Puerto Rico for the purpose of: (1) distributing the proceeds of an illegal gambling operation; (2) committing extortion; and (3) conspiring to commit both of these offenses.[1] The Court of appeals affirmed the convictions[2] and an application for writ of certiorari was denied by the Supreme Court.[3] Marquez admitted that the government's two principal witnesses, Monserrate and Tomas Alvarez, perjured themselves as to testimony which "went to the heart and substance" of the government's case.[4]

In order to place the present motion in proper perspective, it will be useful to briefly outline the relevant testimony at trial. The essence of the government's charge was that Marquez, the "boss" or "banker" of the operation, caused Monserrate, by means of threats against him and his father-in-law Tomas Alvarez, to travel to Puerto Rico for the purpose of returning to Marquez funds of which he was alleged to have cheated the operation. The evidence established that on December 7, 1969, codefendant Rivera, who was a "controller" in the policy

1. 18 U.S.C. Sections 1952, 371.

2. United States v. Marquez, 449 F.2d 89 (2d Cir. 1971).

3. Marquez v. United States, 405 U.S. 963 (1972).

4. The two codefendants do not join Marquez in this motion.

operation, told Monserrate, who was a "pickup" man or messenger, that something was wrong in his operation and that "Raymond" (Marquez) wanted to see him at the "bank," the headquarters of Marquez's policy operation. The next day Rivera drove Monserrate and Alvarez to the "bank," a florist shop, where Monserrate was taken into a room of an adjoining premise and was met by petitioner, Marquez, and a codefendant, Angelet. Marquez accused Monserrate of cheating the operation by placing bets for himself after two numbers had been published. Monserrate denied the cheating, which Marquez computed at $14,000; when Monserrate said all the money he had was in Puerto Rico, at one point or another both Marquez and Angelet ordered him to go there immediately to return with the money; when Monserrate sought delay because his wife was in the hospital, Marquez and Angelet responded that was not their problem; that Monserrate knew with whom he was playing and better bring back the money for his own good. Other statements of a similar nature, clearly threats, were made by Marquez and Angelet. Later, when Alvarez was brought into the room, he also was accused of cheating by Marquez, and during this session threats of physical violence were made, and at one point Angelet upraised a long iron bar which he threatened to ram into Alvarez's chest. Marquez told Alvarez if he did not pay, his family would have to pay and that he could not escape. Monserrate testified he was scared and frightened that something might happen to his family. The next morning, December 9, Monserrate withdrew $1000 from a bank and gave either $700 or $800 to Rivera, who testified he delivered the money to Marquez. Monserrate used the balance to purchase a round trip air passage ticket to Puerto Rico, to where he flew that day and retrieved $7,435 from his aunt, who had been holding it for him. He flew back to New York the next day and upon deplaning at Kennedy Airport was met by FBI agents who told him they were aware of his problem with Marquez. He agreed to cooperate, told them what had occurred at the "bank," and turned over the $7,435 to the agents. The following morning, December 11, Monserrate, pursuant to the

instructions and under surveillance of FBI agents, returned to the "bank," where he delivered the $7,435 to Marquez, whereupon he was arrested.

The instant motion for a new trial upon the claim of newly discovered evidence is made two years after the return of the jury verdict. The petitioner's newly retained attorneys, engaged after the affirmance of the judgment of conviction, made arrangements with Pedro Lopez, an acquaintance of Monserrate, to engage in conversations with respect to his testimony at the trial. Lopez's conversations with Monserrate and one with Alvarez spanned to period from May to September 1972, and took place in the office of the attorneys, who actively participated in that discussion. On all occasions Lopez had on his person a concealed tape recorder. Statements made by Monserrate and Alvarez during these recordings, allegedly at variance with their trial testimony, are the basis of the present motion, as to which an evidentiary hearing was conducted. The petitioner contends that Monserrate, the principal witness, testified falsely at the trial that (1) Marquez ordered him to go to Puerto Rico to return with the money he said he had there; (2) that upon his arrival at Kennedy Airport he turned over to FBI agents the money he had brought here from Puerto Rico; and (3) that he did not cheat the gambling operation. Marquez also alleges that Alvarez testified falsely at the trial with respect to his role in the cheating.

In addition to the opportunity to observe the witnesses who testified at the evidentiary hearing, the Court has read a translation of the transcriptions of the recordings submitted by petitioner's counsel, since the conversations except the one at the attorney's office were mostly in Spanish. While the tapes, unclear in many spots, contain statements which could be viewed as at variance with Monserrate's trial testimony as to the three specifications of alleged perjury noted above, it is unnecessary to consider the first two because this Court is convinced beyond a reasonable doubt, based upon the evidence presented at the

hearing, the demeanor of the witnesses thereat and the trial record, that Monserrate's trial testimony as to these matters was truthful. We shall presently consider Monserrate's acknowledgment at the hearing, that contrary to his trial testimony, he did cheat the gambling operation, which he insisted was the only matter as to which he gave false testimony at the trial. As to the other two items, Monserrate adhered to the substance of his trial testimony that Marquez ordered him to go to Puerto Rico to get the money and made the threats, direct and implied; aos, that upon his return he surrendered the $7,435 to the FBI agents at the airport. Monserrate's trial and hearing version of his surrender of the money to the FBI was fully corroborated by the trial and hearing testimony of FBI agents and by the written receipt for the money given an FBI agent.[5]

Alvarez's trial and hearing testimony also lend support to Monserrate's trial and hearing account of Marquez's order that he go to Puerto Rico to obtain the money. And while it may be argued that Alvarez's testimony is suspect, strong corroboration is found in the circumstances that the morning following the "kangaroo court," presided over by Marquez and Angelet, Monserrate withdrew $1000 from his bank account, using part of the proceeds for his airplane tickets; that he left that very day for Puerto Rico and returned the next day; further, that Alvarez, too, the morning following these events, gave Rivera, who came to his home, his entire savings, $1000, because he was afraid. But entirely apart from affirmative evidence supporting Monserrate's trial testimony on the foregoing two items, there are factors which seriously undermine those portions of the taped conversations which petitioner relies upon to support his

5. Petitioner relied upon Monserrate's statement during one of the tape recordings, when led on by Lopez's suggestive question, that upon arrival at Kennedy Airport he was met by some of Marquez's men and turned the money over to them and not to the FBI. If this were the fact, there is no explanation for petitioner's failure to produce at the hearing his men who allegedly received the money.

charges. First, Monserrate's taped recorded statements are by no means a "model of clarity;" indeed, they are not only unclear, but abound with contradictions of the very statements upon which petitioner relies; there are points at which Monserrate confirms that Marquez did direct him to get the money from Puerto Rico accompanied by threats,[6] and that he did surrender the money to the FBI at Kennedy Airport.[7] Secondly, the questioning by Lopez, and on the one occasion by Marquez's attorneys was continually leading, suggestive and left no doubt as to the answers that were desired, which in a number of instances parroted the questions. Monserrate was clearly under considerable pressure and "harassed" throughout these conversations. At several points Lopez accused Monserrate of quealing on Marquez and testifying against him for money.[8] It is not surprising that under these circumstances he lied to Marquez's lawyers and Lopez in order, as he put it at the hearing, "to get them off my back" because "all I wanted was to be left alone."[9] Moreover, both Monserrate and Lopez testified at the hearing that the former consumed substantial quantities of liquor during the course of each of the recorded conversations.[10] Monserrate stated that he was drunk when he left the lawyers' offices and one of the lawyers admitted hard liquor was consumed by Monserrate, but denied he was drunk while there; and an earlier recorded conversation with Lopez

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6. *See, e.g.*, p. 13 of 8/22/72 tape transcript: —"And then Raymond Marquez and Angelletto and a few more Italian guys they made me go to Puerto Rico and get the money and they tell me if I don't go to Puerto Rico and get that money they are going to kill my family, my three kids and my wife." *See also p. 24.*

7. *See* pp. 17-18 of 8/2/72 tape transcript.

8. *See* pp. 21-24 of 8/17/72 tape transcript.

9. Hearing minutes, 91-92.

10. *Id.* at 15-17, 74-76.

contains a declaration by Monserrate that he was drunk.[11] Based upon a consideration of all factors, the Court finds that Monserrate's testimony at trial as to (1) Marquez's order, accompanied by threats, to go to Puerto Rico and return with the money, and (2) his meeting at Kennedy Airport with the FBI was truthful and not in any way perjured.

We now turn to the third item, Monserrate's and Alvarez's trial testimony that they did not cheat Marquez's gambling operation. Monserrate admitted at the evidentiary hearing, as the tape recordings reflect, that his trial testimony on this subject was false. His explanation was that he felt he was in jeopardy; that there had been talk of putting bullets through people; and he was afraid of both Marquez and Angelet; further, that at the time of trial a relative, whom he regarded as his mother, was dying; his wife was at the hospital and with the troubles in the case he "wouldn't have cared if I had died."[12] Whatever his explanation, which of course does not excuse perjury, the question remains whether the denial of the cheating at the trial constitutes sufficient grounds to warrant a new trial.

Preliminarily, we consider the appropriate standard under which this claim is to be reviewed. The general standard governing motions for a new trial on the ground of newly discovered evidence is that the evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative or impeaching, and of such a character that it would probably produce a different verdict in the event of retrial.[13] A mere liberal stnadard applies, however,

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11. *See* p. 13 of 7/28/72 tape transcript.

12. Hearing minutes, 87.

13. *See* United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973); United States v. DeSapio, 456 F.2d 644, 647 (2d Cir. 1972); United States v. Polisi, 416 F.2d 573, 576-577 (2d Cir. 1969).

in some instances, where the newly discovered evidence establishes that testimony introduced against a defendant was perjured. "Where the conviction is shown to be based even in part upon perjured testimony . . . a court will not stop to inquire as to the precise effect of the perjury, but will order a new trial if without the perjury the jury might not have convicted."[14] Recently, however, the Court of Appeals has suggested that this more liberal test should be restricted to instances of perjury which involve prosecutorial misconduct.[15] The movant contends that the government knew that Monserrate cheated and permitted him to give perjured testimony, but this allegation is without the slightest evidential support. At the hearing the FBI agents and the Assistant United States ATtorney involved in the case testified that Monserrate refused to admit that he had cheated during "interrogations" prior to the trial. Indeed, at the hearing he acknowledged that he had never told any law enforcement officials that he had cheated prior to a discussion with an FBI agent in late 1972 when interviewed in connection with the present motion.[16] The government agents can hardly be accused of suppressing information which they did not possess. There is no basis for suggesting, as movant does, that the FBI and the United States Attorney had an obligation to pursue the question of whether Monserrate had in fact cheated and should

14. United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969). This is the rule articulated in Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928).

15. United States v. DeSapio, 435 F.2d 272, 286, n. 14 (1970), *cert. denied*, 402 U.S. 999 (1971).

16. Alvarez also testified at the hearing that he never admitted cheating to law enforcement officials.

not have accepted his denials at face value. The issue was totally unrelated to the guilt or innocence of the defendants and was, as to the investigation they were conducting.[17-18]

In the absence of prosecutorial misconduct, the ultimate question to be decided is whether, had Monserrate testified at the trial that he cheated, it would probably have produced a different verdict. At the outset it is noted that the subject of cheating was exaggerated far out of proportion to its significance as to the essential elements of the crimes charged, and while proper on the issue of credibility, was patently an attempt to becloud the issue. Whether or not Monserrate or his father-in-law cheated Marquez's policy operation was not an element of the crimes charged against him or directly related to his guilt or innocence.[19] To put the matter in proper focus, the Court instructed the jury:

> "There has been much evidence and discussion as to whether Nieves cheated — a charge he denies. Even if you should find, as the defendants contend, that Nieves Monserrate cheated through a fix of numbers on the policy operation, this does not justify extortionate means to obtain the return of the money by wrongful threats and the inducement of fear. The alleged wrongful acquisition of the proceeds by Monserrate is not a defense against the crime of extortion. Accordingly, should you find that Nieves Monserrate cheated as claimed, and further find that the defendants intended to obtain the return of all or part of the money by

17. Hearing minutes, 156-57.

18. *Id.* at 164-65.

19. *Cf.* United States, v. Munchak, 338 F. Supp. 1283, 1292-93 (S.D.N.Y.), *aff'd.* 460 F.2d 1407 (2d Cir.), *cert. denied.* 409 U.S. 915 (1972).

instilling fear that either he or a member of his family would be injured, — and if the other elements of the offense under counts 2 and 3 are met beyond a reasonable doubt, you have sufficient upon which to convict."[20]

Movant, however, argues that had Monserrate admitted upon the trial that he had cheated the gambling operation, it would have affected the jury's deliberation in two respects. First, that since he had transported the proceeds of his betting activities to Puerto Rico, the jury might have believed that he, Monserrate, either individually or as part of the conspiracy, had violated the law and was testifying favorably for the government in order to avoid prosecution, and that this would have cast doubt upon the substance of his testimony as to what happened at the flower ship. The suggestion that Monserrate was himself the likely subject of prosecution is, to understate it, rather farfetched. The FBI agents had information that Monserrate had gone to Puerto Rico because of his "trouble" with Marquez and told him they were there to protect him. To argue that a prosecution was intended against the alleged victim of the extortion carries its own refutation. Moreover, it was entirely clear from the FBI agents' and Monserrate's trial testimony that he did in fact cooperate with them from his arrival at Kennedy Airport until the arrest of Marquez the following day, and the jury was free to surmise, as defense counsel argued, that he must have had reasons for so doing. Indeed, to the extent that movant claims that he was deprived of the opportunity to argue effectively to the jury that Monserrate was cooperating with the government in order to protect himself from possible charges of wrongdoing, it must be pointed out that the inference was available regardless of whether he had cheated, because the interstate transportation of the proceeds of a gambling operation with intent to distribute is a crime whether they are honestly or dishonestly acquired.[21]

20. Trial minutes of Dec. 18, 1970, pp. 39-40.

21. See 18 U.S.C. Section 1952.

Movant's second theory is that if Monserrate had admitted cheating, the jury would have more readily accepted the defendant's contention that Monserrate voluntarily decided, as a matter of conscience, to travel to Puerto Rico to return the money which he had stolen from the operation. The movant suggests it is easier to believe that a man voluntarily returned what he had stolen from another when he admits his theft than to believe that a man would voluntarily give up his own money to which those demanding it had no justifiable claim. But this theory cuts both ways. If Monserrate had admitted that in fact he cheated the operation, the jury might have more readily believed that Marquez was sufficiently angered to make the threats to which Monserrate and Alvarez testified. In addition, considering "the kangaroo court" conducted by Marquez in association with Angelet, the threats of violence thereat, the testimony of Rivera, the third defendant, that Monserrate did admit the cheating, and the totality of the trial record, the jury may well have viewed Monserrate's denial of cheating with skepticism. And the jury may well have accepted the defendant's contention which was so forcefully presented, that Monserrate had cheated, but nonetheless was satisfied that the government had sustained its burden as to the essential elements of the crimes charged. Most importantly, however, the question of cheating was tangential to the principal issues; it went principally to credibility; it did not touch upon the essential elements of the crime. Furthermore, the thesis that Monserrate, after having cheated the operation of thousands of dollars, would voluntarily, in the absence of any threats, travel to and from Puerto Rico in a fast and hurried trip in order to obtain and return the proceeds of his theft approaches the incredible. Against the background of the trial as it unfolded from day to day, witness to witness, the totality of the trial evidence and the record of this proceeding, this Court is satisfied to a moral certainty that had Monserrate and his father-in-law

acknowledged upon the trial they had cheated the policy operation,[22-23] it would not have, whichever test is applied, whether the outcome of the trial—in sum, that it would not have raised a reasonable doubt in the mind of a single juror.[24]

There is also an entirely independent ground which requires the denial of this motion. It is well established that a motion for a new trial must be denied if the evidence, with due diligence, could have been discovered during the course of the trial[25] or the pendency of the appeal.[26] The record clearly establishes, however, that Pedro Lopez, the individual who approached Monserrate, was known to petitioner prior to the occurrence of events at the "bank" in December 1969 and available to Marquez's counsel prior to the disposition of the appeal in the summer of 1971. At the hearing Lopez testified that he was contacted by both Marquez's present and trial counsel sometime prior to the summer of 1971 concerning the possibility of his assisting Marquez. Given the availability of Lopez, no explanation has been offered or is readily apparent as to why the

22. 10 Ga. 511, 527 (1851).

23. 24 F.2d 82, 87 (7th Cir. 1928).

24. *Cf.* United States v. Munchak, 338 F. Supp. 1283, 1291-93 (S.D.N.Y.), *aff'd.* 460 F.2d 1407 (2d Cir.), *cert. denied.* 409 U.S. 915 (1972).

25. *See, e.g.*, United States v. Edwards, 366 F.2d 853, 873-74 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967); Brown v. United States, 333 F.2d 723 (2d Cir. 1964) (per curiam); United States v. Munchak, 338 F. Supp. 1283, 1293-94 (S.D.N.Y.), *aff'd.* 460 F.2d 1407 (2d Cir.), *cert. denied.* 409 U.S. 915 (1972).

26. *See* United States v. Rao, 318 F. Supp. 416, 420 (S.D.N.Y. 1970); United States v. Hoffa, 247 F. Supp. 692, 701 (E.D. Tenn. 1965), *aff'd.* 382 F.2d 856 (6th Cir. 1967), *cert. denied.* 390 U.S. 924 (1968).

evidence upon which the present motion is based was not secured for over a year thereafter. Under these circumstances, it cannot be said that the requirement of due diligence has been met.

The motion for a new trial is denied.

Dated:
New York, N.Y.
August 2, 1973

s/Edward Weinfeld
United States District Judge

APPENDIX "B"

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

452 September Term 1973

(Argued January 22, 1974, Decided January 22, 1974)

Opinion Filed January 31, 1974

Docket No. 73-2129

HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES,

Circuit Judges.

UNITED STATES OF AMERICA v. RAYMOND MARQUEZ

* * *

Appeal from an order of the United States District Court for the Southern District of New York, Edward Weinfield, Judge, denying appellant's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Affirmed.

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APPENDIX "C"

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 12th day of March, , one thousand nine hundred and seventy-four.

Present:

HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Raymond Marquez, a/k/a "Spanish Raymond",
Anthony Angelet, Pedro Rivera,
a/k/a "Pete Russo",

Defendants,

Raymond Marquez, a/k/a "Spanish Raymond",

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1522

RAYMOND MARQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erroneously denied his belated motion for a new trial predicated on the perjury of government witnesses.

After a jury trial in the United States District Court for the Southern District of New York, petitioner and two co-defendants were convicted on all three counts of an indictment charging interstate travel to distribute gambling proceeds, interstate travel in furtherance of an extortion, and conspiracy, in violation of 18 U.S.C. 1952 and 371. Petitioner was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed, 449 F. 2d 89, and this Court denied certiorari, 405 U.S. 963.

Nearly two years later, petitioner filed a motion for a new trial predicated upon the alleged perjury of witnesses Monserrate and Alvarez at his trial.

Evidence at the 1970 trial established that petitioner, who ran an illegal gambling operation in which Monserrate was employed as a messenger, accused Monserrate of cheating the operation and, by means of threats against him and his father-in-law, Alvarez, caused Monserrate to travel to Puerto Rico for the purpose of returning to petitioner funds of which the operation was allegedly cheated.

Monserrate had testified at the trial that in December 1969 co-defendant Rivera brought him and Alvarez to petitioner's establishment, where petitioner accused him of placing bets after the "numbers" had been published (T. Tr. 32-42).[1] Monserrate testified that, as a result of threats of physical violence made by petitioner and co-defendant Angelet, he withdrew $1,000 from a bank and gave either $700 or $800 to Rivera, who delivered the money to petitioner. Monserrate purchased round trip air transportation to Puerto Rico with the balance. In Puerto Rico, Monserrate obtained $7,435 from a relative, returned to New York, and was met at Kennedy Airport by FBI agents, who induced him to cooperate with the government. The Agents took the money and gave Monserrate a receipt for it (T. Tr. 57-65). On the agents' instructions, Monserrate delivered the $7,435 to petitioner the next day while under surveillance by the FBI agents, who then arrested petitioner (T. Tr. 64-75).

At trial Monserrate testified for the government as to the extortion scheme but denied having cheated petitioner's gambling operation (T. Tr. 71, 177, 233, 234, 242). Alvarez testified that, as a result of threats made

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[1] "T. Tr." denotes the transcript of petitioner's original trial in 1970. "H. Tr." denotes the transcript of the hearing on petitioner's motion for a new trial.

by petitioner and his co-defendants, he paid $1,000 to petitioner (T. Tr. 416-422). Alvarez likewise denied cheating the operation (T. Tr. 421, 444-445, 465, 468-469). Testimony of the FBI agents and documentary evidence, including airline ticket stubs, bank books, and photocopies of the currency paid by Monserrate to petitioner, corroborated the government's presentation of events (T. Tr. 62, 275-278, 288-292, 320-325, 329-333, Govt. Exhs. 1, 2, 6-9).

During 1972 Pedro Lopez, an acquaintance of Monserrate, was engaged by petitioner to enter into discussions with Monserrate while concealing a tape recorder on his person (H. Tr. 5-6, 10-15). Statements made by Monserrate and Alvarez while intoxicated, and recorded secretly by Lopez, allegedly contradicted their earlier sworn testimony (Def. Exhs. A-G). At an evidentiary hearing on the new trial motion, Monserrate admitted that he had in fact cheated the gambling operation, but insisted that this was the only matter as to which he had testified falsely at petitioner's trial; he otherwise adhered to the substance of his original testimony.

In a written opinion (Pet. App. A) affirmed by the court of appeals (Pet. App. B), the district court found that Monserrate had told the truth at trial when he testified that he gave the money to the FBI agents at the airport and that petitioner ordered him to go to Puerto Rico to obtain the money. In denying petitioner's motion for a new trial, the court held that although Monserrate and Alvarez testified falsely that they had not cheated petitioner's operation, the testimony neither resulted from governmental misconduct nor was relevant to the principal issues at trial. The court found that,

had Monserrate and Alvarez admitted their cheating at trial, it would not have raised a reasonable doubt in the mind of a single juror.

The court's finding that there was no government misconduct with respect to the witnesses' perjury was supported by the record. In their investigation, the FBI agents repeatedly asked Monserrate whether he had cheated petitioner's operation; Monserrate insisted that he had not, that he simply bet constantly. The government possessed no evidence to the contrary. Even when confronted with Lopez's recordings, Monserrate at first continued to insist that he had testified truthfully.

Absent governmental misconduct, a new trial should be ordered only if new evidence is discovered that would probably produce a different verdict. *United States* v. *DeSapio,* 435 F. 2d 272, 286, n. 14 (C.A. 2), certiorari denied, 402 U.S. 999; *United States* v. *Kahn,*[2] 472 F. 2d 272, 287 (C.A. 2), certiorari denied, 411 U.S. 982.[2] In the circumstances of the instant case, we submit that the trial court correctly held that the newly discovered evidence would not have raised a reasonable doubt in the mind of a single juror.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[2]The more stringent test of *Larison* v. *United States,* 24 F. 2d 82, 87 (C.A. 7), has no application where, as here, the perjury is committed without governmental misconduct. See *United States* v. *DeSapio, supra.*